

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

CXT, Inc.

Employer

and

Case 19-RD-3496

Anthony James Easley, an Individual

Petitioner

United Steelworkers of America,
Local 338¹

Union

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record² in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees employed by the Employer at its Spokane, Washington, facility; but excluding all office clerical employees, guards and supervisors as defined by the Act, and all other employees.

¹ The name of Petitioner appears as corrected at hearing.

² The parties filed briefs, which have been considered.

The Employer is engaged in the manufacture of pre-stressed concrete products at a facility located in Spokane, Washington. The sole issue in the hearing is the Union's contention that Petitioner (Easley, herein) is a statutory supervisor.

The Employer and the Union are parties to a collective bargaining agreement with a term of October 1, 1998 through September 30, 2001. The Union was certified as the collective bargaining representative October 23, 1987, in prior case 19-RC-11646.³

Easley is the maintenance foreman in the Employer's railroad division in Spokane, which manufactures ties, crossings, and turnouts. There are approximately seven additional employees on his crew, all mechanics. Easley reports to Tim Carden, maintenance manager, who also has responsibility for two maintenance employees in the Employer's precast division, also located in Spokane, and two maintenance employees in the Employer's facility in Grand Island, Nebraska. Easley has been foreman since sometime in 1999.

The maintenance crew performs scheduled preventive maintenance and responds to calls from the production area for emergency repairs. Easley meets every morning for 15 minutes to half an hour with Carden, and Carden lines out the work to be done that day.⁴ Easley then relays Carden's orders to the other employees. If Carden is going to be gone for several days, Carden and Easley meet for a longer time, up to two hours, and Carden lines out the work that is to be done in his absence. In addition, Easley and Carden talk frequently during the day. Easley carries a cell phone and can contact Carden even when Carden is out of town. Carden requires that Easley call him at least three times a day when Carden is out of town.

The mechanics know their jobs and know the priorities of the equipment. All maintenance employees carry radios. If the production area calls on the radio for an emergency repair, any mechanic hearing the call might respond that he will take care of it. Easley may direct that a different mechanic respond to the call instead, but there is no evidence in the record as to the reason why Easley might give such direction or how often he does so. Easley testified that when a call comes over the radio for an emergency repair, if no one volunteers to take the call, he can ask a particular person to take it, but cannot order them to. He said that sometimes when he asks a mechanic if they would mind taking the call, they tell him they don't have time, and then the task goes to someone else.⁵

Easley meets with the other mechanics once a week on Thursdays for about 45 minutes. During these meetings, they discuss ongoing projects, safety issues, who will be working on which projects, who will be taking time off, things Carden wants, and complaints from the crew⁶. For example, in such a meeting two weeks prior to the hearing, Easley said that all "power shoes"⁷ would be built on swing shift, not on days. There is no evidence in the record with respect to the basis for this decision, or whether the decision was made by Easley.

An employee witness testified that on some unspecified number of occasions, when he was, for example, working on the saw, a call came over the radio for a repair; he offered to take it, but Easley told him to let someone else take it and continue with what he was doing. There is

³ I take administrative notice of Regional records in this regard.

⁴ Although not given great detail in the record, Carden's lining out the work involves prioritizing what work needs to be done that day, and who will perform it.

⁵ There is no record explanation of how the task goes to someone else.

⁶ Discussed more fully below.

⁷ Undefined in the record.

no evidence with respect to why Easley told him this. The same witness said that there was an instance when a mud buggy⁸ was down; he took the call and made a hose for it, then went to make the repair, but when he arrived at the scene, Easley said that they would change out the mud buggy⁹ instead of repairing it on the spot, to save time. On another occasion, Easley told another employee that it was all right for the employee to enter mixer one, a confined area,¹⁰ although there had been an earlier discussion in a Thursday meeting that there was a possibility that a permit would be needed to enter the area.¹¹ An employee witness testified that he is expected to follow Easley's instructions or be subject to discipline, although there is no evidence in the record that any employee has ever been disciplined or threatened with discipline for not following Easley's instructions.¹²

Carden interviews and hires new employees. Easley has been asked by Carden to give welding tests to job candidates, and to report the results back to Carden. There is no evidence Easley makes any recommendation with respect to hire. Easley has filled out evaluation forms for two probationary employees. There is no evidence that in doing so he made any recommendations as to retention or promotion of those employees.¹³ Easley has also reported incidents of misconduct by employees to Carden, and has sat in on meetings that included Carden, a delinquent employee, and a Union representative, in which discipline of the employee was discussed. There is no evidence that Easley ever makes any recommendations with respect to discipline.

During the Thursday meetings, Easley makes notes of any employee complaints brought to his attention. There is no evidence with respect to what Easley does with such notes. An employee witness testified that Easley has told employees whose complaints he noted to give him 24 hours to review the situation and get back to them. There is no specific evidence as to the nature of such complaints, and no evidence as to whether Easley consults with Carden before responding to complaints, although he certainly does not resolve these matters on the spot. The contractual grievance procedure requires that an aggrieved employee first consult with his supervisor in an attempt to resolve a complaint. The record reflects that in all cases Carden has been the supervisor so consulted, and that Easley has never acted as the Employer's representative at Step 1 or any other step in the formal grievance procedure.

Easley has no authority to permit employees to leave work early. Easley testified that he has no authority to approve overtime. An employee witness testified that Easley approves overtime without consultation with Carden. The witness said that: "I go to Tony. At that point, he will either ask me to work overtime, or I will suggest to him that I can work overtime. And then he will either yea or nay it." The witness further testified that: "I usually ask him at 20

⁸ Undefined in the record. Presumably a mobile concrete mover.

⁹ That is, remove it and replace it with another, functioning mud buggy.

¹⁰ A confined area is one where the access is minimal in dimension and proper air flow is questionable. The witness said that the Employer is developing a new policy regarding working in confined areas.

¹¹ The record does not establish whether a permit is in fact needed to enter mixer one, or whether Easley's permission or instruction to the employee to enter mixer one was in any way contrary to normal Employer policy, or whether he was simply conveying a decision made by Carden.

¹² There is no record evidence of what policies or instructions that Easley was following when he gave such instructions.

¹³ Easley testified: "I have one instance of two employees, those are the only two and it was a 30-day probation and it was whether we kept them or not." He also testified that Carden assigns new mechanics to work with more experienced mechanics, and will ask the more experienced mechanics their opinion of such new mechanics' work. Easley was not specifically asked whether he made any recommendations with respect to retention of the probationary employees.

minutes to 10 minutes before the shift ends for me. And at that time, he will make that decision, as soon as I ask him.” The witness did not testify as to the circumstances in which this occurs, or the regularity.¹⁴ There is no evidence as to whether Easley has been given any prior instructions as to the circumstances in which he might approve overtime for employees,¹⁵ or whether the decision is routine or in nature.

Easley reviews the employees’ time sheets and makes corrections thereon in accordance with instruction given to him by Carden. For example, if an employee is scheduled to begin work at 6:00 a.m. and clocks in at 5:45, Easley corrects the time sheet to a 6:00 a.m. start time to avoid payment of overtime to which the employee is not entitled.

An employee witness testified that Carden has told him that Carden is very busy and that employees need to follow the chain of command by taking any issues first to Easley, who will decide whether to discuss them with Carden. There is no evidence regarding any specific issues that employees have raised with Easley, or whether this hearsay report is true.

Easley normally arrives for work between 7:15 and 7:30 a.m. His designated shift is 8:00 a.m. to 4:30 p.m., Monday through Friday. He is paid \$17.00 per hour, of which \$2.50 is a premium for being foreman. His wage rate and the foreman premium are set by the collective bargaining agreement. Easley’s name appears on the maintenance schedule along with the names of the other seven employees. The maintenance employees have varying shift times, beginning variously at 3:30 a.m., 6:00 a.m., and 11:30 a.m. Easley is the only one who starts at 8:00 a.m.

Easley has an office in which there is a desk and a computer. Easley and Carden have keys to the office. Easley leaves the office unlocked when he is on the premises, and other maintenance employees are free to enter and leave the office and to use the computer to check schematic drawings. Easley spends the majority of his time working side-by-side with other maintenance employees. An employee witness testified that Easley does not have a tool box, and that Easley had told employees in the Thursday meeting held two weeks prior to the hearing that he had been assigned other responsibilities and would not be making repairs in the future unless at his own discretion. The same witness testified that he has since that meeting observed Easley working on equipment and that he had a toolbox at that time.¹⁶

Easley wears the same type of clothing worn by other maintenance employees, including the same color hard hat, and takes his breaks and lunches in the same break room with them. In contrast, Carden wears “nicer” clothing and a white hard hat, and eats elsewhere. Easley has been issued a purchase card by the Employer, but Carden has forbidden him to use it. Easley’s classification is covered by the collective bargaining agreement. There is no evidence in the record regarding other foremen employed by the Employer, except a brief mention that there are production foremen, and no contention that any such foreman other than Easley is a statutory supervisor.

Conclusion.

¹⁴ I take the statement he will “make the decision” as a conclusion by the witness based on the fact that Easley gives an immediate answer.

¹⁵ I.e., whether or not he is exercising “independent” judgment.

¹⁶ The witness further testified that if Easley worked with him, Easley used his (the witness’s) tools; then he said that Easley “will supervise me” during the use of the tools; not that Easley tells him how to use his tools, but that Easley will instruct him on what piece of equipment to work on.

Section 2(11) of the Act defines a "supervisor" as:

. . .[A]ny individual having authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Union concedes that Easley has no authority to hire, transfer, suspend, lay off, recall, discharge, or reward employees, or to effectively recommend such actions. The Union contends that Easley has authority to assign employees and to responsibly direct them, and that he participates in promoting and disciplining employees.

In support of its contentions, the Union relies on the Supreme Court's decision in *NLRB v. Kentucky River Community Care, Inc.*, ___ U.S. ___ (May 29, 2001). In that case, the Court rejected the Board's interpretation of the phrase "independent judgment," which had been that professional judgment applied in directing less skilled employees to deliver services is not "independent judgment." The Court made clear, however, that the Board determines what level of "responsible direction" qualifies for supervisory status (so long as that interpretation comports with the Act). In that same case, the Court agreed with the Board that the burden of demonstrating supervisory status is on the party claiming that such status exists.

Here, the Union has failed to establish that Easley exercises more than minor discretion. Easley testified that he regularly receives specific instructions from Carden as to employee assignments. Employee testimony that Easley tells them their assignments does not contradict Easley's testimony in this regard. There is no evidence that in assigning tasks to employees Easley is doing anything other than following the instructions given him by Carden. Nor does employee testimony establish that Easley responsibly directs the employees. Easley testified that he is merely a conduit for Carden's instructions. That it appears to employees that Easley makes decisions "on the spot" does not establish that he is exercising any discretion, as he could just as easily and likely be following earlier instructions from Carden, as making the decisions independently as postulated by these witnesses.

Further, the record evidence with respect to Easley's direction of employees does not establish that such direction rises to the level of the statutory indicium of responsible direction. In reaching its decision in *Kentucky River* the Court acknowledged that the statutory term "independent judgment" is ambiguous with respect to the degree of discretion required for supervisory status, and that many nominally supervisory functions may be performed without the exercise of such a degree of judgment or discretion as would warrant a finding of supervisory status under the Act. As noted by the Board in *George C. Foss Company*, 270 NLRB 232 (1984):

[T]he legislative history of Section 2(11) indicates that Congress intentionally distinguished between "straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire, or fire, discipline, or make effective recommendations with respect to such actions." Thus, a "leadman" or "straw boss" may give "minor orders [or] directives or supervise the work of others, but he is not necessarily a part of management and a 'supervisor' within the Act." *Black Kettle, Ltd.*, 263 NLRB 380 (1982); *NLRB v. Doctor's Hospital*, 489 F.2d

772, 776 (9th Cir. 1973).¹⁷

There is evidence that Easley has given employees directives, such as telling an employee to continue working on the saw instead of taking a repair call, telling an employee to exchange a functioning mud buggy for one that needed repair, telling an employee that it was all right to enter mixer one, or allowing an employee to work overtime. However, the record does not reveal the full context of these events; as it stands is insufficient to establish that any significant degree of discretion on Easley's part is required.

With respect to promotion and discipline, there is evidence that Easley makes factual reports to Carden, but there is no evidence that he makes any recommendations, much less that they are followed.

The Union offered considerable evidence regarding secondary indicia of Easley's status, including that he has an office which he can lock, that he carries a cell phone and has a purchase card, that other employees regard him as their supervisor, that Carden has told employees to deal with Easley regarding unspecified issues, and the fuzzy testimony regarding whether or not Easley has his own tools. Other secondary evidence includes Easley's testimony that he spends the majority of his time performing repair work, wears the same type of clothing worn by other employees and the same color hard hat, is not allowed by Carden to use the purchase card, appears on the same maintenance schedule as other employees, and the high ratio of supervisor to employees (two to seven) if Easley were to be found to a supervisor. Thus, while some secondary factors would support a finding of supervisory status, others would not. In any event, secondary factors do not convert an individual to supervisory status where the record fails to establish that the individual possesses at least one of the Section 2(11) primary indicia. *Northcrest Nursing Home*, 313 NLRB 491 (1993)

In *Kentucky River*, supra, the Court upheld the Board's long-standing policy that the burden of establishing supervisor status rests upon the party asserting its existence. Here, the Union has failed in its burden, and I conclude that on this record, Easley has not been shown to be a supervisor within the meaning of Section 2(11) of the Act. Accordingly, he is an eligible petitioner; I shall direct an election.

There are approximately 190 employees in the Unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently

¹⁷ *Foss*, at 234.

replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by UNITED STEEL WORKERS OF AMERICA, LOCAL 338.

NOTICE POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 19 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office, 915 Second Avenue, 29th Floor, Seattle, Washington 98174, on or before September 13, 2001. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (206) 220-6305. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by September 20, 2001.

DATED at Seattle, Washington this 6th day of September, 2001.

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177-8580-3900